179

(2)

No. 10-564

Supreme Court, U.S.
FILED
DEC 28 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife, a Nevada General Partnership; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Petitioners,

v.

CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

CATHERINE CORTEZ MASTO
Attorney General for the State of Nevada

By: Solicitor General C. Wayne Howle
Counsel of Record
100 N. Carson Street
Carson City, NV 89701
(775) 684-1227
WHowle@ag.nv.gov

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Ninth Circuit was correct when it concluded that speech limitations on brothel advertising in Nevada are measured by the standard test used for commercial speech limitations articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–66 (1980).

2. Whether the Ninth Circuit was correct when it concluded that Nevada's limitations on brothel advertising are constitutional and do not violate the petitioners' First Amendment rights.

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings are all correctly identified in the caption of the case. The petitioners were plaintiffs/appellees below; respondent was the defendant/appellant in the earlier proceedings.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Argument 4

1. The Circuit Conducted The Conventional Analysis To Arrive At Its Decision 4

2. Petitioners Raise A Novel Argument Not Argued Or Decided Below 5

3. Decision Has No Broad Future Application . 7

Conclusion 8

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 3

Central Hudson Gas & Electric Corp. v. Public Service Commission,
447 U.S. 557 (1980) 4, 5

Citizens United v. Federal Election Com'n,
130 S.Ct. 876 (2010) 6

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 7

Coyote Publishing v. Miller,
598 F.3d 592 (9th Cir. 2010) 3

District Attorney's Office for Third Judicial Dist. v. Osborne,
129 S.Ct. 2308 (2009) 3

Eu v. San Francisco County Democratic Central Comm.,
489 U.S. 214 (1989) 6

Pickering v. Board of Educ.,
391 U.S. 563 (1968) 5

Statutes, Rules

Nev. Rev. Stat. 201.295–201.440 1
Nev. Rev. Stat. 201.430 2
Nev. Rev. Stat. 201.440 2

Nev. Rev. Stat. 244.345 1
S. Ct. R. 10 4

Other

Annotation, H. Rockwell, *Constitutionality and Construction of Pandering Acts*, 74 A.L.R. 311 (1931, 2010 supp.) 2

Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. Pub. Int. L.J. 225 (2010) 6, 7

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioners have adequately described the opinions below, the jurisdiction of this Court, and the constitutional and statutory provisions involved in this matter.

STATEMENT OF THE CASE

The decision considered here addresses regulation of brothel advertising in the State of Nevada, whose approach to prostitution is unique among the states. In particular this case questions whether Nevada's scheme for regulation of brothel advertising violates the First Amendment.

Prostitution is a crime in every state including Nevada, where it is unlawful in certain of the State's seventeen counties. Nevada has dealt uniquely with the activity by (1) prohibiting prostitution in counties over 400,000, and (2) leaving it to the remaining counties to decide whether to criminalize prostitution or authorize it. Nev. Rev. Stat. 244.345. If authorized, the activity must be permitted and is heavily regulated. Nev. Rev. Stat. 201.295–201.440.

One aspect of regulation is control of brothel advertising. Two statutes accomplish this purpose.

These two statutes—Nev. Rev. Stat. 201.430 and 201.440—are the focus of this case.

The category of speech at issue is ordinarily known as pandering, and is generally punishable as a crime. *See e.g.* Annotation, H. Rockwell, *Constitutionality and Construction of Pandering Acts*, 74 A.L.R. 311 (1931, 2010 supp.) (addressing laws meant to "curb the panderer . . . whose commercialization of prostitution . . . has the tendency to organize and further the practice, and make it more prevalent"). In all states but Nevada, there would be no question about regulation of such activity because it is not lawful communication. Nevada, however, has authorized its rural counties to decide for themselves whether to authorize operation of brothels. If they choose to do so, the counties closely regulate brothel activities for the protection of the public health, safety and welfare. Part of this regulatory scheme is control of brothel advertising, set out in State statutes.

Petitioners depend for their argument on the fact that brothels are—in some Nevada counties—lawful, and urge that brothel advertising deserves the same liberty as any other commercial speech. Nevada and the Ninth Circuit disagree.

Prostitution, legal or not, is not like other commercial activity. As the Ninth Circuit (the Circuit) correctly determined, prostitution implicates profound state interests. When these interests are acknowledged in the analysis of Nevada's limitations on brothel advertising, they logically and necessarily justify those limitations.

The Circuit's decision details the public policy conundrum that prostitution poses for all organized societies. By decriminalizing some limited prostitution, Nevada sets itself apart from the other states. But the broader societal and governmental interests in the context of which this approach has long existed are the same as in all states. *See Coyote Publishing v. Miller*, 598 F.3d 592, 603–04 (9th Cir. 2010) (discussing policies protecting the "conception of personhood"), and *id.* at 611 (concurring opinion of Noonan, J.) (describing the "network of laws setting off married couples from unmarried individuals [indicating] the central role of sexual intercourse in civil society in Nevada as elsewhere in the United States"). These broad interests inform and justify Nevada's direct purpose for limiting brothel advertising. That direct purpose—whether characterized as "preventing the commodification of sex," 598 F.3d at 604, or "suppress[ing] speech that offers sexual intercourse for sale," *id.* at 612 (concurring opinion of Noonan, J.)—is a weighty one the accomplishment of which Nevada has calculated to require the limitations in question. The Circuit's decision properly upholds this product of "normal democratic processes in the laboratories of the States." *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C. J., dissenting), *quoted in District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2326 (2009).

ARGUMENT

No "compelling reasons," Sup. Ct. R. 10, justify a grant of certiorari in this case. Therefore the petition for certiorari should be denied.

1. THE CIRCUIT CONDUCTED THE CONVENTIONAL ANALYSIS TO ARRIVE AT ITS DECISION.

Petitioners' argument that the Circuit's decision reestablishes the vice exception is a straw man, starting with an easily stated but incorrect premise which is then demolished. The entirety of petitioners' first argument, Petition 7–13, is for this reason impertinent. Contrary to petitioners' suggestion, the Circuit decision does not resurrect the vice exception. After a thoroughgoing review of the relevant precedents, the Court expressly concluded: "we may not apply a general 'vice exception' to the protections accorded to commercial speech." 598 F.3d at 600. Rejecting Nevada's invitation to do so, it analyzed the brothel advertising regulations using the standard paradigm established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–66 (1980).

Nevada had urged the Circuit to consider application of a different, less demanding test. 598 F.3d at 599–602. The Court expressly declined to do so: "The distinctive contours of the problem of prostitution are . . . relevant to the *Central Hudson* analysis. But they do not require that we discard the overall standard altogether rather than incorporating the points of distinction where they fit when applying that standard." *Id.* at 602.

Thus the four part test set out in *Central Hudson Gas* controlled the decision. Though recognizing the *sui generis* nature of the case, the Circuit did not depart from the *Central Hudson* precedent. That precedent, discerningly applied, adequately took account of the uniqueness of prostitution and the State's interest in regulating it, thereby yielding the correct result.

This result does not mean that the Circuit has resurrected the vice exception. Instead, it establishes that the *Central Hudson* factors constitute a discriminating test instead of a bright-line rule or litmus test. Such test is not unique in First Amendment cases. *Cf. Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968) (establishing balancing test for use in public employee free speech cases). If the Circuit's decision here upholds Nevada's brothel advertising statutes after other laws petitioners believe regulate vice advertising have been struck down, it only demonstrates that the *Central Hudson* test is effective at discerning among different cases. In this way, the decision does not commend review but rather serves to validate the *Central Hudson* approach.

2. PETITIONERS RAISE A NOVEL ARGUMENT NOT ARGUED OR DECIDED BELOW.

Petitioners have, without warning, transformed this case into one about political speech. *See* Petition at *i, Questions Presented*, question two.

Problematically this argument was not raised below. Moreover, petitioners fail to explain why brothel advertising is in any sense "political speech"

such as that considered recently in *Citizens United v. Federal Election Com'n,* 130 S.Ct. 876, 898 (2010) (explaining that political speech is "speech uttered during a campaign for political office," *quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)).

Petitioners' various references to "political speech," appearing both in the question presented[1] and at various points in the petition,[2] are conflations of terms: on the one hand, political speech; on the other, the distinct and separate concept of content-based regulation.

The first category of speech is so prized that it "might be maintained that political speech simply cannot be banned or restricted as a categorical matter. . . ." *Citizens United,* 130 S.Ct. at 898. Content-based regulation of commercial speech, on the other hand, is concisely and correctly assessed in the Ninth Circuit's analysis, *see* 598 F.3d at 599, n.10, which concluded that *Central Hudson's* calculus includes consideration of any regulation based upon content.

Nothing in this conclusion is remarkable; this is the well-accepted meaning of *Central Hudson*. *See e.g.*

---

[1] Petition at i and 13 ("Whether *Central Hudson* Applies to Restrictions on Disfavored *Political Speech*. . . .") (emphasis added).

[2] See Petition at 15 (referencing "political message that sex is a commodity that can be sold"); 16 (asserting that State's concern is with "political content"); 17 (referencing "political reasons" for regulation); and 18 (invoking the "vigorous protections afforded political speech").

Darrel C. Menthe *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. Pub. Int. L.J. 225, 252 (2010) ("in the landmark 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established an intermediate scrutiny test for content-based regulation of commercial speech").

The Circuit relied on recent past Ninth Circuit decisions that, in turn, depended on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993), in which the fourth prong of *Central Hudson* was employed just as it was here to consider the necessity for content-based regulation. The *Central Hudson* commercial speech analysis is in fact flexible enough to justify its use, whether or not Nevada's brothel advertising regulations are content-based.

To the extent that petitioners' argument is that brothel advertising is political speech, the argument should be rejected because it was not raised below. To the extent the argument is that the Circuit wrongly determined that *Central Hudson* applies to content-based regulation of commercial speech, it is mistaken.

3. DECISION HAS NO BROAD FUTURE APPLICATION.

This is a case narrowly cabined by the circumstance that no other state has authorized prostitution in any form; neither does any other state entertain the prospect of it. Consequently there is obviously no split in the circuits on the questions presented here, nor will there be in the future.

The Ninth Circuit's decision is also unlikely to spawn new developments in First Amendment law. Although petitioners assert that the decision leaves the possibility of expansion into other areas ("no principled stopping point," Petition at 12) the opposite is true. The Circuit decision articulates this point. Even if prostitution is categorized as trade in human beings or parts, such as are slavery, child adoption, surrogacy and organ sales, 598 F.3d at 603, the Circuit expressly rejected intention to reach these other activities. *Id.* 598 F.3d at 603, n. 15.

CONCLUSION

There are no issues of great moment created by the Ninth Circuit's decision in this matter. The decision determined, unsurprisingly, that limitations on brothel advertising established in Nevada law are consonant with the First Amendment. This result was accomplished by detailed, dutiful application of the Court's precedent governing commercial speech limitations, and it does not contradict or conflict with any other circuit's decision. Nor does it threaten to unreasonably extend the law in significant or unwarranted ways.

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

CATHERINE CORTEZ MASTO,
Attorney General for the State of Nevada

By: Solicitor General C. Wayne Howle
Counsel of Record
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1227
WHowle@ag.nv.gov

Dated: December 28, 2010